

## The Honorable Thomas S. Zilly

UNITED STATES DISTRICT COURT  
WESTERN DISTRICT OF WASHINGTON  
AT SEATTLE

BAO XUYEN LE, as Personal Representative  
of the Estate of TOMMY LE; HOAI "SUNNY"  
LE; and DIEU HO,

**Plaintiffs,**

VS.

REVEREND DR. MARTIN LUTHER KING  
JR. COUNTY; and KING COUNTY DEPUTY  
SHERIFF CESAR MOLINA,

## Defendants.

No. 2:18-CV-00055-TSZ

DEFENDANT KING COUNTY'S  
SUPPLEMENTAL BRIEFING TO  
THE COURT'S MINUTE ORDER  
NO. 272

***Noted for: February 25, 2021***

## I. ARGUMENT

Defendants King County and KCSO Deputy Cesar Molina filed separate Objections To A Fully Virtual Trial. See *Dkts. 168 & 271*. Plaintiffs filed no response. The Court then ordered the parties to file supplemental briefing on that issue as well as factors specific to this trial. *Dkt. 272*.

The parties were asked to address whether this Court could still require the trial to be conducted virtually over the defendants' objections in light of *Liu v. State Farm*

*Mut. Auto. Ins. Co.*, --- F. Supp. 3d. ---, 2020 WL 8465987 (W.D. Wash. Dec 17, 2020), *Dkt.* 272(k). While one takeaway from *Liu* is that the trial court exercised that option under Fed. R. Civ. 43(a)<sup>1</sup>, no appellate court has yet affirmed such a decision when one party objects. And, the admitted liability, one-week trial in *Liu* is decidedly different from the multiple party, complicated legal three-week trial in this case.<sup>2</sup> See ABA Journal Weekly Newsletter, “*Judges differ on when it’s safe to hold in-person jury trials*” (2/19/21)(citing that U.S. District Court Judge Robert Lasnik found that unfeasible social distancing requirements, a lack of protective equipment and his belief that risks to certain demographics, including the elderly and people with underlying health conditions, make it “difficult, if not impossible, to obtain a jury pool that would represent a fair cross section of the community”).<sup>3</sup> The reasoning by these learned judges should be weighed against the rationale offered in *Liu*. Additionally, King County Superior Court began conducting live trials again last week in light of the

---

<sup>1</sup> The Notes of Advisory Committee on FRCP 43 emphasize, “The importance of presenting live testimony in court cannot be forgotten. The very ceremony of trial and the presence of the fact-finder may exert a powerful force for truth-telling. The opportunity to judge the demeanor of a witness face-to-face is accorded great value in tradition.”

<sup>2</sup> In *United States v. Fanyo-Oatchou*, 2020 WL 6685063, U.S. District Judge John C. Coughenour continued a criminal trial to June 2021 finding:

1. “The COVID-19 pandemic has made it difficult for the Court to obtain an adequate spectrum of jurors to represent a fair cross section of the community, which would likely make proceeding with an earlier trial date impossible or would result in a miscarriage of justice. *See* 18 U.S.C. § 3161(h)(7)(B)(i).

2. Public health guidance has impacted the ability of jurors, witnesses, counsel, and Court staff to be present in the courtroom. Therefore, proceeding with an earlier trial would be impossible or would result in a miscarriage of justice. *See* 18 U.S.C. § 3161(h)(7)(B)(i).

<sup>3</sup> *U.S. v. Arumugam*, CR19-041RSL.

1 Governor significantly reopening the State and the greatly reduced COVID-19 numbers  
 2 over the last couple of weeks.

3       King County strongly objects to a remote trial and the following responses to the  
 4 Court's Minute Order should not be viewed as a waiver of its stated position.

5       King County addresses the subjects in Paragraph 2 starting with 2(c), the  
 6 anticipated number of trial days. The parties originally estimated up to 15 court days.  
 7 That was before the pandemic outbreak so an additional 1-2 days may be needed to  
 8 conduct *voir dire* remotely and to deal with anticipated technical challenges that have  
 9 plagued virtual trials. In addition, Paragraph 2(c) necessitates recognition that any  
 10 prolonged requirement of the jurors to follow the trial remotely will add to the number  
 11 of days of trial. And, as discussed in *Liu, supra*, "the trial days will be shortened (and  
 12 include several breaks) to further reduce the possibility of distraction and/or fatigue  
 13 among the jurors." As a result, a fully remote trial will likely necessitate additional trial  
 14 days.<sup>4</sup>

16       As to Paragraph 2(d), number of exhibits and 2(e), number of witnesses, King  
 17 County believes its previous representation of 85 exhibits and 40 witnesses for trial is  
 18 accurate. Defendants will work with opposing counsel to address admissibility of  
 19 exhibits pretrial to expedite the proceedings.

---

22       <sup>4</sup> That being said, defendants have dispositive motions pending that, if granted, will greatly  
 23 streamline the trial. Defendants intend to file supplemental motions in limine which, if granted,  
 could also drastically reduce the length of trial.

1           As to Paragraph 2(f), regarding witnesses testifying remotely however the trial is  
 2 conducted, King County believes any non-King County witnesses who are concerned  
 3 about appearing in-person due to the pandemic and certain out-of-state experts should  
 4 be able to testify remotely.

5           As to Paragraph 2(j) limiting the number of attorneys and litigation staff in the  
 6 courtroom, King County will require its two counsel, one paralegal, one tech support  
 7 and a King County representative at all times.<sup>5</sup>

8           As to Paragraph 2(g), the impact on jurors of an in-person trial, King County  
 9 believes that with an 8-person jury, any in-person attendance can be accommodated.  
 10 King County Superior Court has placed jurors in the spectator seating area to ensure  
 11 adequate social distancing.

13           As to Paragraph 2(h), remote jury deliberations, King County strongly believes  
 14 all deliberations should be conducted in-person. This will ensure continuity and focus.

15           As to Paragraph 2(i) access of the public to trial, that can be accomplished by  
 16 access to a remote platform.

## 17           II. CONCLUSION

18           Defendant King County respectfully requests that this trial be tried in-person in  
 19 its entirety for the reasons outlined in its Objections To a Fully Virtual Trial. Defendants  
 20 will be irreparably prejudiced by a proceeding that cannot obtain an adequate spectrum  
 21 of jurors to represent a fair cross section of the community due to the COVID-19  
 22

---

23           <sup>5</sup> It is anticipated co-defendant Cesar Molina and his counsel will also be present with King  
 County throughout trial, while properly socially distanced.

1 pandemic. There is no measurable prejudice to setting a new trial date in the near future  
2 that affords a traditional and proven method to seek justice.

3  
4 DATED this 23<sup>rd</sup> day of February, 2021 at Seattle, Washington.  
5  
6

DANIEL T. SATTERBERG  
King County Prosecuting Attorney

7  
8  
9 *s/Daniel L. Kinerk*  
10 DANIEL KINERK, WSBA #13537  
11 CARLA B. CARLSTROM, WSBA #27521  
12 Senior Deputy Prosecuting Attorneys  
13 Attorney for King County Defendants  
14 King County Prosecuting Attorney  
15 500 Fourth Avenue, Suite 900  
16 Seattle, WA. 98104  
17 (206) 296-8820 Fax (206) 296-8819  
18 [dan.kinerk@kingcounty.gov](mailto:dan.kinerk@kingcounty.gov)  
19 [carla.carlstrom@kingcounty.gov](mailto:carla.carlstrom@kingcounty.gov)  
20  
21  
22  
23

1                   **CERTIFICATE OF MAILING AND SERVICE**

2                   I hereby certify that on February 23, 2021, I electronically filed the foregoing  
3 document(s) with the Clerk of the Court using the CM/ECF System which will send  
4 notification of such filing to the following participants:

5                   Jeffrey M Campiche  
6                   Philip G. Arnold  
7                   Jeffrey Katz  
8                   Attorneys for Plaintiffs  
9                   CAMPICHE ARNOLD PLLC  
10                  111 Queen Anne Avenue North, Suite 510  
11                  Seattle, WA 98109  
12                  (206) 281-9000  
13                  jcampiche@campicichernold.com  
14                  parnold@campicichernold.com  
15                  jkratz@campicichernold.com

16                  Timothy R. Gosselin  
17                  Attorney for Cesar Molina  
18                  GOSSELIN LAW OFFICE, PLLC  
19                  1901 Jefferson Ave., Suite 304  
20                  Tacoma, WA 98402  
21                  253-627-0684  
22                  tim@gosselinlawoffice.com

23                  I declare under penalty of perjury under the laws of the United States and the  
24 State of Washington that the foregoing is true and correct.

25                  DATED this 23<sup>rd</sup> day of February, 2021 at Bellevue, Washington.



26                  Rafael A. Munoz-Cintron  
27                  Legal Assistant  
28                  King County Prosecuting Attorney's Office